IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 558 WDA 2022

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

DEREK MARSHALL,

Appellant.

BRIEF FOR APPELLANT

Appeal from the Judgment of Sentence Entered April 8, 2022, in the Court of Common Pleas of Allegheny County in CP-02-CR-0003258-2016

Mary Catherine Roper
P.A. I.D. No. 71107
Kevin Trainer
P.A. I.D. No. 326064
LANGER, GROGAN & DIVER P.C.
1717 Arch St., Ste 4020
Philadelphia, PA 19103
Tel: (215) 320-5706
mroper@langergrogan.com
ktrainer@langergrogan.com

Joseph S. Otte
P.A. I.D. No. 318862
1002 Law & Finance Building
429 Fourth Ave.
Pittsburgh, PA 15219
Tel: (412) 529-0583
ottepgh@gmail.com

December 16, 2022

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STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the judgment of sentence of the Allegheny Court of Common Pleas is established by 42 Pa.C.S.A. § 742.

ORDER IN QUESTION

Commonwealth of Pennsylvania
v.
Derek Alexander Marshall

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO:	**CP-02-CR-0003258-2016**
DATE OF ARREST:	**03/04/2016**
OTN:	**G 736731-2**
SID:	
DOB:	

GAGNON II -- ORDER OF SENTENCE

AND NOW, this 8th day of April, 2022, the defendant having been convicted prior in the above-captioned case is hereby re-sentenced for said Violation by this Court as follows. The defendant is to pay all applicable fees and costs unless otherwise noted below:

Count 1 - 18 § 3921 §§ A - Theft By Unlaw Taking-Movable Prop (F2)

To be placed on Probation - County Regular Probation - for a minimum period of 5 Year(s) and a maximum period of 5 Year(s) to be supervised by ALLEGHENY COUNTY ADULT PROBATION.
The following conditions are imposed:

Costs - Violations Costs: Violation costs are waived.

Restitution - Regular Payments: Defendant is to make regular payments on the balance of restitution owed. Close once paid in full

Comply - Rules of Probation And Parole: Defendant to comply with all Allegheny County General Rules of Probation and Parole.

This sentence shall commence on 04/08/2022.

Count 2 - 18 § 3921 §§ A - Theft By Unlaw Taking-Movable Prop (F3)

A determination of guilty without further penalty.

Count 3 - 18 § 3925 §§ A - Receiving Stolen Property (F2)

A determination of guilty without further penalty.

Count 4 - 18 § 903 - Conspiracy - Receiving Stolen Property (F2)

To be placed on Probation - County Regular Probation - for a minimum period of 12 Month(s) and a maximum period of 12 Month(s) to be supervised by ALLEGHENY COUNTY ADULT PROBATION.
The following conditions are imposed:

Other: NO ACTION TAKE ON this count 4-8-2022

This sentence shall commence on 01/09/2017.

BY THE COURT:

Thomas E. Flaherty

Judge Thomas Flaherty

STATEMENT OF SCOPE AND STANDARD OF REVIEW

"[T]he scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the sentence. . . ." *Commonwealth v. Infante*, 888 A.2d 783, 790 (Pa. 2005). When, as here, the challenge is to the legality of the revocation and subsequent sentence, the standard of review is *de novo* and the scope plenary because they are questions of law. *See Commonwealth v. Kuykendall*, 2 A.3d 559, 563 (Pa. Super. Ct. 2010) (legality of revocation and sentence based on question of violation of a constitutional right subject to *de novo* review).

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court commit legal error by revoking Mr. Marshall's probation for not paying the full amount of restitution by the end of probation without any evidence that he willfully refused to pay or an on-the-record finding that he willfully refused to pay restitution, in violation of binding precedent that permits revocation of probation for technical violations, including nonpayment, only if the defendant has willfully refused to comply?

   (Answered in the negative by the court below)

2. Did the trial court commit legal error by imposing additional punishment in the form of an additional period probation on Mr. Marshall for not paying the full amount of restitution during his period of probation without any evidence that he willfully refused to pay or an on-the-record finding that he willfully refused to pay restitution, in violation of Pennsylvania precedent and the Fourteenth Amendment?

(Answered in the negative by the court below)

STATEMENT OF THE CASE

On January 9, 2017, Derek Marshall pleaded guilty to felony charges of theft by unlawful taking, receiving stolen property, and conspiracy. The trial court sentenced him to five years of probation and ordered him to pay $68,031.43 in restitution to one individual and two businesses. Rule 1925(a) Opinion dated Sept. 1, 2022, attached as Exhibit A at 2.

With respect to the restitution, the sentencing order stated: "The court has established a payment plan in which the case payments will begin 30 days from the date of this order with first payment due on the first day of the following month. This Restitution is imposed as a part of the sentence and as a condition of probation." 1925(a) Opinion at 2-3. Mr. Marshall's restitution payments began in February 2017.

Mr. Marshall's term of probation was set to end on January 9, 2022. The Commonwealth sought to revoke his probation because, despite his payments, he had not been able to afford to pay the entire balance of $68,031.43 in restitution by the end of the term of probation. (N.T. 4/8/2022 at 3) Mr. Marshall had complied with all of the other terms of his probation and had made restitution payments throughout his probationary period, payments that totaled $2,496 at the time of his revocation hearing. *See* id. Since that time, the docket reflects that Mr. Marshall has continued making payments toward his court-ordered restitution.

On April 8, 2022, Mr. Marshall appeared for a *Gagnon II* hearing. At that hearing, the sole allegation from Adult Probation (an attorney from the Commonwealth was not present) was that Mr. Marshall still had "a balance owed" of $65,539 on the $68,031.43 in restitution he had been ordered to pay in 2017. (N.T. at 3) The government recommended that the trial court find Mr. Marshall in technical violation of his probation, revoke his probation, and sentence him to a new term of probation of five additional years. Id.

The trial court did not ask Mr. Marshall why he had not paid off the entire $68,031.43, but it asked if he was working, and if he thought he could pay the debt within the next five years. (N.T. at 4) Mr. Marshall testified that he was working as a waiter and a cook, and he also offered lessons and training at his business, a stable. He also stated that he was in the process of getting certified to offer Equine-

Assisted therapy for people with PTSD and other disabilities. He testified that he was trying to pay off what he owed, and hoped to be able to do so in five years, but that being on probation was interfering with his ability to get business. (N.T. at 4) There was no testimony or other evidence about his income or expenses.

Although Mr. Marshall's counsel initially asked the trial court to accept the Adult Probation recommendation (N.T. at 3), after hearing Mr. Marshall's testimony, she urged the court not to revoke Mr. Marshall's probation and to instead end probation since the restitution would remain owing whether or not he was on probation, and he would, in fact, be able to earn more money toward the debt if he were not on probation. (N.T. at 5) Counsel offered to file a motion to "close interest" to accomplish that. Id.

The trial court, however, stating that Mr. Marshall would have more "incentive" to pay if he were on probation, told Mr. Marshall to continue making regular payments, revoked Mr. Marshall's probation and sentenced him to another five years of probation. (N.T. at 5, 6-7) The trial court did not make any findings about Mr. Marshall's ability to pay the remaining $65,539 and did not make a finding that he willfully refused to pay the remaining $65,539.

After the sentencing, Mr. Marshall obtained new pro bono counsel, who filed a post-sentencing motion, which is attached hereto as Exhibit B.[1] In the post-sentencing motion, Mr. Marshall argued that the revocation of his probation and imposition of an additional sentence in the absence of any evidence that he willfully failed to pay the outstanding $65,539 violated both Pennsylvania precedent and the Fourteenth Amendment to the United States Constitution. Id. That motion is attached hereto as Exhibit "A" in lieu of a statement of errors complained of on appeal.

Mr. Marshall filed a timely Notice of Appeal from the April 8, 2022 Order on May 9, 2022, which was docketed on May 13, 2022. After the commencement of the appeal, Mr. Marshall filed a separate motion to close interest to end Mr. Marshall's probation on June 14, 2022, which the trial court denied on July 29, 2022.

On September 1, 2022, the trial court filed its Opinion.[2] In its Opinion, the trial court did not address Mr. Marshall's past ability to pay – that is, whether he

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[1] Mr. Marshall's counsel filed the post-sentencing motion on April 29, 2022, along with a motion for leave to file the post-sentencing *nunc pro tunc*. The trial court granted leave to file the post-sentencing motion *nunc pro tunc* on May 3, 2022, making the post-sentencing motion timely. Because of the commencement of this appeal, that motion was not ruled on.

[2] The trial court found "the allegations of error … apparent from the face of the record," and therefore "elected not to direct that a concise statement of matters complained of on appeal be filed." Opinion at 3. As required by Pa.R.A.P. 2111(a)(11) and Pa.R.A.P. 2111(d), this brief contains an averment by counsel, at the end, that no order to file a statement of errors

had willfully violated the order that he pay $68,031.43 in restitution by failing to pay all of the restitution ordered before January 9, 2022.

Instead, the trial court cited Section 1106 of the Crimes Code for the proposition that when restitution is imposed as a part of the sentence, the defendant's ability to pay the restitution at the time the restitution is imposed is irrelevant. Opinion at 4. The trial court quoted this Court's recent opinion in *Commonwealth v. McCabe*, 230 A.3d 1199 (Pa. Super. Ct. 2020), for the proposition that "restitution is mandatory and the defendant's financial resources, i.e., his ability to pay, is irrelevant unless and until he defaults on the restitution order." Opinion at 4. The court did not address Mr. Marshall's ability to pay in the context of his default, i.e., the violation with which he was charged. Instead, the court went on to assert that, because "Defendant's payment of restitution was [also] a condition of his probation, failure to pay restitution is a violation of the terms and conditions of probation." Opinion at 5.

The trial court did address ability to pay in the context of its imposition of a *new* term of probation, stating that it had considered Mr. Marshall's ability to pay his debt before the conclusion of the new term of probation, which will run from

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complained of on appeal pursuant to Pa.R.A.P. 1925(b) was entered by the trial court. The trial court's Opinion appears directed, at least in part, to the errors asserted in Mr. Marshall's post-sentencing motion, attached hereto as Exhibit B.

2022 to 2027: “At the violation hearing, his ability to pay was considered by this Court in setting a new probationary period. In fact, Defendant indicated that he hoped to satisfy his restitution balance within the next five (5) years. (4/8/22 N.T. p. 4).”

SUMMARY OF THE ARGUMENT

A court may not revoke probation for a technical violation unless that violation is willful. *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. Ct. 1984). That protection for the probationer has been well established in Pennsylvania law for decades and applied in a myriad of contexts of technical violations, ranging from nonpayment to checking in with probation to drug testing. In the nearly forty years since *Dorsey*, our appellate courts have consistently held that only the *willful* failure to pay money ordered by the Court can constitute a technical violation of probation and give rise to the potential for revocation.

Equally well established are the heightened protections that apply when the technical violation involves the failure to pay money. Because of our collective abhorrence for the punishment of a person solely for his poverty, Pennsylvania precedent requires that when a court must determine whether a probationer willfully failed to pay money as ordered, that court must affirmatively inquire into the reason that the probationer did not pay prior to revocation. A court cannot revoke probation and cannot impose additional punishment (such as a new

sentence of probation) in the absence of record evidence that the defendant could have, but refused, to pay the sum owed. *See Dorsey*, 476 A.2d at 1311; *see also Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

Mr. Marshall had fulfilled his five-year term of probation without a single charged violation, but he could not, within the five-year period, pay off the more than $68,000 in restitution he was sentenced to pay. Mr. Marshall worked at multiple jobs and made payments toward his debt throughout his term of probation, paying over $2200 toward his debt—and he continues to pay today. Yet, at the close of Mr. Marshall's probationary period, he was charged with violating the terms of his probation solely because he had not paid off the entire $68,031.43. The trial judge, without asking if Mr. Marshall could have paid more or making a finding that he had not paid all that he could afford—much less that he could have paid an additional $65,000 over that five years—both revoked Mr. Marshall's probation and sentenced him to an additional five years of probation.

Both of those actions violate the law. The revocation of Mr. Marshall's probation should be vacated, his probation discharged, and his debt collected in the same manner that Allegheny County collects court debt from other defendants who have completed their sentences.

ARGUMENT

I. The trial court violated decades of Pennsylvania precedent when it revoked Mr. Marshall's probation and sentenced him to an additional five years of probation without any evidence and without making a finding that Mr. Marshall could have paid full restitution of $68,031.43 before the end of his term of probation but willfully did not.

The trial court committed two legal errors. Correction of these errors requires that the revocation of Mr. Marshall's probation and new sentence of five years' probation be vacated and his probation discharged.

A. The trial court erred when it revoked Mr. Marshall's probation.

When the trial court revoked Mr. Marshall's probation for the alleged technical violation of not paying restitution in full without a finding that he could have paid the remaining $65,539 during his initial term of probation, it disregarded nearly forty years of binding precedent from this Court holding that revocation for a technical violation of probation requires a finding of willful failure to comply with the condition.

Whether failure to comply with a condition of probation or parole can be punished absent a finding of willfulness was, prior to 1984, an open question in this Court's jurisprudence. *See, e.g.*, *Commonwealth v. DelConte*, 419 A.2d 780, 782 (1980) (cataloging prior holdings on the subject and presuming, without deciding, that a violation could be found in the absence of willfulness). But in 1984 this Court took on that question directly in a case in which a parolee had failed to

pay court debt he owed before the expiration of his sentence. *See Dorsey*, 476 A.2d at 1311 (citing, inter alia, *DelConte*). After reiterating that at each "revocation proceeding, the Commonwealth must prove by a preponderance of the evidence a violation of such parole [or probation]," this Court held that the Supreme Court's recent decision in *Bearden v. Georgia*, 461 U.S. 660 (1983) set the rule: "[I]n revocation proceedings for failure to pay a fine or restitution, *a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay*, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority." *Dorsey*, 476 A.2d at 1312 (quoting *Bearden*, 461 U.S. at 672, emphasis as applied by the Superior Court). In the case before it, therefore, this Court held that because "the lower court did not inquire into the reasons for appellant's failure to pay or did it make any findings pertaining to the willfulness of appellant's omission," the appellant's conviction could not stand. *Id. See also Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994) (holding that if the court determines the defendant has not willfully refused to pay, the court should "work out a payment schedule or some other alternative" to revocation). *Id*.

In the decades since *Dorsey*, this Court has required a showing of willfulness for every type of technical violation of parole or probation. *See, e.g.*,

Commonwealth v. Heilman, 876 A.2d 1021, 1027 (Pa. Super. Ct. 2005) (court could not revoke probation for failure to attend treatment where there was no evidence of willful noncompliance); *Commonwealth v. Carver*, 923 A.2d 495, 499 (Pa. Super. Ct. 2007) (probation cannot be revoked for a failed drug test "based solely upon technical violations because there was no willful or flagrant disrespect for probationary terms evidenced by defendant"); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1242 (Pa. Super. Ct. 2009) (reversing revocation based on no-contact order when there "was no basis for the trial court's finding that the Commonwealth demonstrated by a preponderance of the evidence that Appellant willfully violated the no-contact order"). This case law is clear and consistent, and this Court has only affirmed revocations where the trial court found willful conduct. Technical violations for nonpayment of fines, costs, or restitution are no different on this point. *See Commonwealth v. Ballard*, 814 A.2d 1242, 1247 (Pa. Super. Ct. 2003) (concluding that the court "cannot sustain revocation of Appellant's probation on the basis of his failure to pay fines, costs, and restitution" when the trial court did not determine "whether his failure to pay was willful").

The only way in which technical violations for nonpayment differ from other technical violations is that this Court has set forth an *additional* requirement: the trial court must affirmatively inquire into the reasons for nonpayment before concluding that the defendant's failure was willful if the defendant does not offer

evidence on that issue. Both the Pennsylvania Supreme Court and this Court have repeatedly held that the legislature did not "seek to punish a defendant for his or her inability to comply" with an order to pay restitution, *Commonwealth v. Petrick*, 217 A.3d 1217, 1225 (Pa. 2019), and that "in Pennsylvania, we do not imprison the poor solely for their inability to pay fines." *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999). To ensure that defendants are not erroneously punished for their inability to pay, this Court in *Dorsey* held that when a defendant is facing revocation for the failure to pay money, the court must assure itself that the defendant was able to pay, even if the defendant does not raise that as a defense. In *Dorsey*, the defendant did not "offer any evidence concerning his indigency," nevertheless this Court vacated the revocation because the trial court did "not inquire into the reasons for appellant's failure to pay [n]or . . . make any findings pertaining to the willfulness of appellant's omission as required by *Bearden*." *Dorsey*, 476 A.2d at 1312. This Court reiterated the need for such findings fifteen years later, explaining that a "proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay, as prescribed by *Dorsey*." *Eggers*, 742 A.2d at 176. And that is still the law. *See Commonwealth v. Willig*, No. 1098 MDA 2017, 2018 WL 1918213, at *3 (Pa Super. April 24, 2018) (citing *Dorsey* and other cases for the proposition that "a

revocation court must inquire into the reasons for a probationer's failure to pay and to make findings pertaining to the willfulness of his omission").

Here, there is no question that the trial court did not comply with this precedent. The court did not ask why Mr. Marshall had not paid the entirety of the restitution owed before January 2022, nor did it make any finding that Mr. Marshall could have paid the full amount but willfully refused to.

In its opinion, the court appears to have misunderstood the applicable standard: it erroneously looked to 18 Pa.C.S. § 1106 and noted that no consideration of ability to pay is required at the time that restitution is *imposed*. That is correct, but also irrelevant at a violation hearing, since the legislature "placed the consideration of a defendant's ability to pay at the more pertinent stage, when a sentencing court must assess a defendant's compliance with the order" upon default. *Petrick*, 217 A.3d at 1225.[3] The charge against him was not for failure to pay *enough* toward his restitution, but simply the failure to pay it off. (N.T. at 3 ("The Defendant was originally court ordered to pay $68,031.43 in restitution. To date, the Defendant has paid $2,496, leaving a balance owed $65,539 to a human victim and businesses."); Opinion at 3 ("Due to his failure to

[3] The trial court emphasizes in its Opinion that it ordered Mr. Marshall to pay over $68,000 in restitution as a condition of his initial period of probation. Were that the case, the trial court would have had to determine, at the original sentencing hearing, that Mr. Marshall was able to pay that amount in the next five years. There is no record of such a determination.

satisfy his restitution prior to the expiration of his five (5) years of probation … Defendant's period of probation was revoked and a new five year period of probation was imposed.").

Regardless of whether Mr. Marshall's restitution obligation was part of his sentence, a condition of probation, or both, this Court's unbroken precedents since *Dorsey* required the trial court to find, as a prerequisite to revocation, that he could have paid off the entire amount before the expiration of his initial five year probation and willfully refused to. The trial court made no such finding.

The trial court did not ask whether Mr. Marshall could have paid an additional $65,000 in the preceding five years, and Mr. Marshall's testimony that he was working multiple jobs (and having trouble expanding his business because of the stigma of his probation) could not support a finding that he had the resources to have paid in full but willingly failed to. The court asked Mr. Marshall whether he could pay off the balance of his restitution in the next five years *after* this revocation, (N.T. at 4 ("So you're thinking within the next five years you can pay it off?"). But the trial court did not probe into the reasons surrounding Mr. Marshall's failure to pay during the *previous* five years, or determine that Mr. Marshall's chose not to pay when he could have, as *Dorsey* requires. *See* 476 A.2d at 1311–12. Indeed, Mr. Marshall's testimony was that he was paying as he was

able, but that being on probation was hindering his ability to expand his business. (N.T. at 4–5)

The trial court did not inquire far enough to determine Mr. Marshall's income, let alone his expenses. This is the type of record that this Court has repeatedly said is insufficient to find a defendant able to pay. *See*, *e.g*., *Commonwealth v. Fusco,* 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991) (information that a defendant would be working, without an indication of income, was not sufficient to show he could pay); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (record insufficient to support imposing a fine when it "does not disclose his current income," and with "no indication in the record that the sentencing court considered appellant's indebtedness"). Even if the trial court had claimed to have made a finding of willful nonpayment, which it did not (the trial court does not use the term "willful" at all), the record would simply be insufficient to support that conclusion.

B. The absence of any evidence or finding that Mr. Marshall willfully failed to pay the full amount of his restitution bars the revocation and new sentence even though the trial court did not incarcerate Mr. Marshall.

The principles set forth above do not apply any differently in this case just because Mr. Marshall was sentenced to a new term of probation rather than to a term of incarceration. Willfulness is an element of any technical violation of probation, regardless of the eventual sentence. And, where the alleged violation is the failure

to pay money, the court's obligation to inquire into the defendant's ability to pay is triggered by the revocation proceedings, not the contemplated sentence. This Court has never suggested otherwise.

Rosenberry is instructive. Although the Court stated that only the "willful refusal to pay a fine may be considered a technical parole violation for which a parolee may be re-incarcerated," 645 A.2d at 1331, in fact, the defendant in *Rosenberry* was *not* incarcerated for nonpayment. Instead, as here, that court gave the defendant an additional period of supervision (there parole), and he was later incarcerated for an unrelated violation that occurred while he was on that illegal parole. *Id.* at 1329. This Court vacated that additional sentence of parole and "discharged [him] from all obligations arising subsequent to the expiration of his original parole period." *Id.* at 1331. While it was the later incarceration that motivated his habeas petition, this Court's holding was that the precedent parole revocation and extension of parole were illegal.

The recent case of *Commonwealth v. Reed*, No. 316 WDA 2022, 2022 WL 16704702 (Pa. Super. Ct. Nov. 4, 2022), is not to the contrary. In that case, this Court vacated a trial court order revoking a defendant's parole and sentencing him to incarceration for the remainder of his sentence term because he failed to pay fines and costs on the grounds that the trial court had failed to inquire into the defendant's ability to pay the debt. *Reed*, 2022 WL 16704702, at *4. In a footnote,

this Court rejected the defendant's argument, raised for the first time on appeal, that the trial court had erred by revoking his parole without an ability to pay hearing. It seems that Reed had only cited cases dealing with imprisonment for inability to pay and had not set forth an argument for why the revocation was itself flawed:

> We note that Appellant argues on appeal that the VOP court erred by *revoking his parole* before conducting an ability to pay hearing. Appellant's Br. at 14-15. Appellant has provided no support for this argument. ***See id.*** Rather, Appellant cites case law requiring a VOP court to hold an ability to pay hearing before imposing a sentence of incarceration. ***See id.*** at 14 (citing ***Commonwealth v. Diaz***, 191 A.3d 850 (Pa. Super. 2018)). The latter issue raises a question of sentencing legality, which we address here sua sponte. ***See Commonwealth v. Prinkey***, 277 A.3d 554, 562 (Pa. 2022) (recognizing legality of sentence claim where court "imposed [sentence] without the fulfillment of statutory preconditions to the court's sentencing authority").

Reed, at *4 n.6 (italics in original). Mr. Marshall, by contrast, has cited – both in the trial court and in this Court – the extensive precedent from this Court establishing that a sentencing court cannot revoke probation for any technical violation, including nonpayment of restitution, unless the trial court first makes a finding of willful nonpayment.

II. The trial court's imposition of a second sentence of five years' probation in the absence of any evidence that Mr. Marshall could have paid the remaining $65,539 before the end of his term of probation also violates the Fourteenth Amendment.

The cases discussed above—*Dorsey*, *Rosenberry*, etc.—are concerned with whether a probation violation has occurred in the first place and the circumstances

under which a trial court may revoke a defendant's probation for nonpayment. Those are substantive decisions of Pennsylvania's modern common law jurisprudence regarding probation. A separate line of cases addresses the federal constitutional limitations on *punishment* following a revocation, culminating in *Bearden*.

In *Bearden*, the U.S. Supreme Court held that to avoid "punishing a person for his poverty," a trial court must inquire into the reasons for nonpayment, make findings on the record about whether nonpayment was willful, and if it is not willful, determine whether some form of punishment is still required to meet the state's interests. *Bearden*, at 671-72. That, in turn, requires consideration of (1) the nature of the individual interest affected, (2) the extent to which it is affected, (3) the rationality of the connection between legislative means and purpose, and (4) the existence of alternative means for effectuating that purpose. *Id*. at 666.

This Court has already held that under *Bearden*, it "is not constitutional for a court to penalize a convict for failing to pay a fine or comply with a restitution order which he or she does not have the ability to pay." *Commonwealth v. Ferguson*, 552 A.2d 1075, 1087 (Pa. Super. Ct. 1988). Moreover, the *Bearden* analysis is straightforward because, in Pennsylvania, the significant deprivation of individual liberty from being on probation is not counterbalanced by a weighty state interest. To the contrary, the legislative purpose is explicitly to *not* "punish a

defendant for his or her inability to comply" with an order to pay restitution. *Petrick*, 217 A.3d at 1225. The trial court's actions here directly contravened that legislative intent, particularly in light of the alternative means for enforcing restitution orders that *Rosenberry* explained are at its disposal. That renders the imposition of an additional five years of probation unconstitutional under *Bearden*.

This Court need not reach any constitutional issue to conclude that the trial court acted unlawfully. However, if it does, then it must conclude that the nature of the punishment is irrelevant to the constitutional analysis. The U.S. Supreme Court explained that in a case where a defendant faced only a *fine*, not incarceration, holding that the "invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (concluding that equal treatment in the criminal justice system under the Fourteenth Amendment requires free transcripts for appeals even when not facing incarceration).

This Court, too, has rejected the position that the *Bearden* line of cases only protects indigent defendants from incarceration, as the Court ruled in *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988) that indigent defendants who cannot afford to pay must still be admitted into accelerated

rehabilitative disposition ("ARD")—a situation where the court was not unwinding an unconstitutional jail sentence:

> If the petitioner has no ability to make restitution despite sufficient bona fide efforts to do so, the State must consider alternative conditions for admittance to and completion of the ARD program. To do otherwise would deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Accordingly, if this Court were to resolve this case under the Fourteenth Amendment and the U.S. Supreme Court's decisions, there is no question that sentencing Mr. Marshall to an effectively indefinite period of probation—at first for five years, but now an additional five years on top of that and counting until the restitution is fully paid—violates his right to fundamental fairness in light of his poverty just as much as if the trial court had incarcerated his. It is the imposition of punishment, not the form thereof, that is unconstitutional in the absence of a finding of willfulness nonpayment.

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Marshall requests that this Court vacate the order of the trial court finding him in violation of probation and discharge him from probation.

Respectfully submitted,

/s/ *Mary Catherine Roper*
Mary Catherine Roper
Pa. I.D. No. 71107
Kevin Trainer
Pa. I.D. No. 326064
LANGER GROGAN & DIVER P.C.
1717 Arch Street, Suite 4020
Philadelphia, PA 19103
(215) 320-5706
mroper@langergrogan.com
ktrainer@langergrogan.com

Joseph S. Otte
P.A. I.D. No. 318862
1002 Law & Finance Building
429 Fourth Ave.
Pittsburgh, PA 15219
Tel: (412) 529-0583
ottepgh@gmail.com

Date: December 16, 2022

Counsel for Appellant

AVERMENT PURSUANT TO Pa.R.A.P. 2111(a)(11) AND 2111(d)

I certify pursuant to Pa.R.A.P. 2111(a)(11) and Pa.R.A.P. 2111(d) that averment that no order to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) was entered by the trial court.

/s/ *Mary Catherine Roper*
Dated: December 16, 2022 Mary Catherine Roper

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.P. 2135 that this brief does not exceed 14,000 words.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

/s/ *Mary Catherine Roper*
Dated: December 16, 2022 Mary Catherine Roper

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

DEREK MARSHALL,

Defendant.

CC NO.: 3258-2016
Superior Court No: 558 WDA 2022

OPINION

JUDGE THOMAS E. FLAHERTY

Copies to:

Counsel for Commonwealth/Appellee:

Office of the District Attorney
303 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Counsel for Defendant/Appellant:

Joseph Otte, Esquire
1002 Law & Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, CC NO.: 3258-2016
Superior Court No: 558 WDA 2022

v.

DEREK MARSHALL,
Defendant.

OPINION

FLAHERTY, J. August 22, 2022

Derek Marshall ("Defendant") appeals from this Court's April 8, 2022 Order of Sentence entered following a Gagnon II violation of probation hearing.

On March 1, 2016, Defendant was charged with one count of theft by unlawful taking of movable property graded as a felony of the second degree; one count of theft by unlawful taking of movable property graded as a felony of the third degree; one count of receiving stolen property graded as a felony of the second degree; and one count of conspiracy, graded as a felony of the second degree. On January 9, 2017, Defendant entered a plea of guilty to all counts. On that date, Defendant was sentenced to a period of probation for five (5) years for theft by unlawful taking of movable property, graded as a felony of the second degree, and a concurrent twelve (12) month period of probation for conspiracy. In addition, Defendant was found to owe restitution in the amount of $68,031.43 to the following individuals or corporations: $14,550.00 to David Gordon; $5,000.00 to Erie Insurance; and $48,481.43 to Orr's Jewelers. As set forth in the Order of Sentence, "The court has established a payment plan in which the case payments will begin 30 days from the date of this order with first payment due on

the first day of the following month. This restitution is imposed as a part of the sentence and as a condition of probation." (1/9/2017 Order of Sentence).

Since January 9, 2017, Defendant has made payments toward restitution totaling $2,492.00 and has a balance remaining of $65,539.43. Due to his failure to satisfy his restitution prior to the expiration of his five (5) years of probation, a Gagnon II hearing was held before the undersigned on April 8, 2022.[1] At the conclusion thereof, Defendant's period of probation was revoked and a new five year period of probation was imposed. Defendant was ordered to continue making regular payments toward the balance of restitution owed and was told that probation would be terminated early if restitution is paid in full.

Defendant timely filed a Notice of Appeal on May 13, 2022. As the allegations of error are apparent from the face of the record, this Court elected not to direct that a concise statement of matters complained of on appeal be filed.

At the Gagnon II hearing, the representative of probation recommended that Defendant's period of probation be revoked and a new five-year probation be imposed and that Defendant continue to make monthly, regular payments toward restitution. (4/8/22 T. p. 3). At that time, Counsel for Defendant stated: "We would ask that you accept the recommendation from Probation. He is making monthly payments." (4/8/22 T. p. 3). Thereafter, this Court asked Defendant if he is working and, with regard to restitution, inquired, "So you're thinking within the next five years you can pay it off?" (4/8/22 T. p. 4). Defendant replied, "I'm hoping so. It's

[1] This Court notes that Defendant had a Gagnon I hearing on November 30, 2021, where he was advised of his violations, he waived his right to an attorney, and a Gagnon II hearing was scheduled before the undersigned on February 11, 2022. At the request of his Gagnon II attorney, the February 11, 2022 violation hearing date was rescheduled to April 8, 2022.

a rather large amount unfortunately...But I'm trying my best, you know, making payments, make the best of and repair the mistakes that I have made years ago." (4/8/22 T. p. 4).

As set forth in the January 9, 2017 Order of Sentence, payment of restitution was a part of Defendant's sentence and a condition of probation. Restitution is governed by 18 Pa.C.S.A. §1106, which states, in relevant part:

> **(a) General rule.**--Upon conviction for any crime wherein:
> (1) property of a victim has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime; or
> ***
> the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.
> **(b) Condition of probation or parole.**--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, the offender's compliance with such order may be made a condition of such probation or parole.
> ***
> **(f) Noncompliance with restitution order.**--Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. ... Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

18 Pa.C.S.A. §1106(a), (b), & (f). As recognized by the Pennsylvania Superior Court in *Commonwealth v. McCabe*, 230 A.3d 1199 (Pa. Super. 2020), "Section 1106 of the Crimes Code specifies that restitution is mandatory and the defendant's financial resources, *i.e.*, his ability to pay, is irrelevant unless and until he defaults on the restitution order." *McCabe*, 230 A.3d at 1208. Defendant violated his restitution order by failing to timely complete payments during his probationary period. At the violation hearing, his ability to pay was considered by this Court in setting a new probationary period. In fact, Defendant indicated that he hoped to satisfy his restitution balance within the next five (5) years. (4/8/22 T. p. 4).

A sentencing court has the ability to enforce restitution orders until the restitution is paid. *Commonwealth v. Griffiths*, 15 A.3d 73, 78 (Pa. Super. 2010). Further, as Defendant's payment of restitution was a condition of his probation, failure to pay restitution is a violation of the terms and conditions of probation. Thus, this Court was within its authority to revoke Defendant's period of probation and impose a new period of probation so as to allow Defendant to satisfy his outstanding restitution balance.

For the reasons set forth above, this Court's April 8, 2022 Gagnon II Order of Sentence should be affirmed.

BY THE COURT,

Thomas E. Flaherty, Judge
Court of Common Pleas

EXHIBIT B

THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	CR-3258-2016
vs.	JUDGE THOMAS FLAHERTY
DEREK MARSHALL	

MOTION TO VACATE SENTENCE AND SCHEDULE
GAGNON II HEARING *NUNC PRO TUNC*

Derek Marshall, through his counsel, Joseph S. Otte, requests that this Court vacate its order revoking Mr. Marshall's probation and imposing a new sentence of probation because this should have inquired about Mr. Marshall's ability to pay and should have made specific findings that he was able to pay before finding him in violation of probation:

I. Procedural History

1. Mr. Marshall pleaded guilty to Theft by Unlawful Taking and related charges on January 9, 2017 and was sentenced to an aggregate term of probation of five years.
2. Mr. Marshall, a former drug user now in recovery, committed several thefts that led to monetary losses for individuals and an insurance company.
3. Mr. Marshall took responsibility for his actions and pleaded guilty.
4. As a part of his sentence, he was ordered to pay over $68,000 in restitution.
5. Mr. Marshall has been compliant with the terms of his probation and has consistently made restitution payments throughout his probationary period.
6. Because Mr. Marshall was not on pace to pay the balance of the restitution, the probation office sought, and this Court granted, a revocation order.

7. On April 8, 2022, Mr. Marshall's probation was revoked and he was resentenced to an additional five-year period of probation.

8. During the hearing, this Court did not inquire about Mr. Marshall's financial circumstances and made no factual findings about Mr. Marshall's ability to pay.

II. Under Pennsylvania law, this Court may not revoke probation for nonpayment without first finding that the defendant willfully refused to pay.

9. Pennsylvania law does not permit courts to extend the length of probation; instead, a court can only "revoke an order of probation upon proof of the violation of specified conditions of the probation." 42 Pa.C.S. § 9771(b). At that point, "the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing," which includes the authority to impose a new sentence of probation.

10. Whenever addressing a technical violation, a court must first find "'wilful or flagrant disrespect' for the terms of probation on the part of the defendants" to revoke probation. *Commonwealth v. Heilman*, 876 A.2d 1021, 1027 (Pa. Super. Ct. 2005) (court could not revoke probation for failure to attend treatment where there was no evidence of willful noncompliance).

11. The general requirement that a technical violation be willful applies equally to revocation for nonpayment. Precedent establishes that the "willful refusal to pay" a financial obligation "may be considered a technical" violation for which probation or parole may be revoked. *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994). *See Commonwealth v. Dorsey*, 476 A.2d 1308, 1311–12 (Pa. Super. Ct. 1984) (answering for the first time "whether

parole or probation may be revoked for less than willful conduct" for nonpayment and concluding that there must be such a finding).

12. Therefore, an "examination of fault must be made before probation is revoked." *Hudak v. Bd. of Prob. and Parole*, 757 A.2d 439, 441 (Pa. Commw. Ct. 2000).

13. The Commonwealth bears the burden to "prove by a preponderance of the evidence a violation," which includes the burden to prove that the defendant willfully refused to pay. *Dorsey,* 476 A.2d at 1311. *See also Miller v. Bd. of Prob. and Parole*, 784 A.2d 246, 248 (Pa. Commw. Ct. 2001) (Commonwealth must prove that a parolee failed to make "bona fide efforts" to pay to prove a violation for nonpayment).

14. To ensure that a defendant's probation is not erroneously revoked, precedent also places an affirmative obligation on this Court to inquire into the reasons for nonpayment. Even when a defendant facing revocation did not "offer any evidence concerning his indigency," the trial court nevertheless acts unlawfully if it does "not inquire into the reasons for appellant's failure to pay [n]or . . . make[s] any findings pertaining to the willfulness." *Dorsey*, 476 A.2d at 1312. Accordingly, a revocation hearing "should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay, as prescribed by *Dorsey*." *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999).

15. In this context, willfulness "means an intentional, designed act and one without justifiable excuse." *Commonwealth ex rel. Wright v. Hendrick,* 312 A.2d 402, 404 (Pa. 1973). Thus, when the only evidence is that a person is "penniless and

unable, through no fault of his own, to pay any sum on the delinquencies," he has not willfully failed to pay. *Id*. *See also Commonwealth v. Diaz*, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018) ("A finding of indigency would appear to preclude any determination that Appellant's failure to pay . . . was willful.").

16. That Mr. Marshall was not incarcerated is irrelevant, as the issue of willfulness goes to whether probation can be revoked in the first place, not whether a particular sentence is appropriate. *Rosenberry* is instructive. There, the defendant's parole was illegally revoked and extended without determining that he had willfully refused to pay. *Rosenberry*, 645 A.2d at 1330–31. *Rosenberry* was later incarcerated for an unrelated parole violation during the illegally extended parole period—and when the Superior Court ruled in his favor, it did so because the original revocation and extension of his parole period was illegal, not because of the subsequent incarceration for an unrelated violation. *Id*.

III. Punishing Mr. Marshall for failure to pay absent evidence that he can pay violates the Fourteenth Amendment to the United States Constitution.

17. In *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), the U.S. Supreme Court held that a court cannot punish a probationer for failure to make court-ordered payments in the absence of evidence that the failure was willful. Whereas the Pennsylvania cases on this point focus on whether any violation has occurred, *Bearden* is concerned with the punishment. To avoid "punishing a person for his poverty," *Bearden*, 461 U.S. at 671, the U.S. Supreme Court held that a trial court must inquire into the reasons for nonpayment, make findings on the record, and consider other sentencing alternatives if the defendant's nonpayment is not willful. Id. at 672.Further, the Court made no factual findings on the issue.

18. By imposing additional punishment in the form of probation on Mr. Marshall because he is too poor to pay the financial obligations, the Court has violated the Fourteenth Amendment and the requirements of *Bearden*. Again, that the punishment was probation and not incarceration is irrelevant. In *Mayer v. Chicago*, one of the precursors in the line leading to *Bearden*, the Court explicitly rejected the argument that the constitutional protections afforded by the Fourteenth Amendment turn on whether the defendant faces incarceration: the "invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S. 189, 197 (1971). In other words, nothing in the Fourteenth Amendment or the U.S. Supreme Court's interpretation thereof actually draws the line for constitutional protections based on whether a defendant faces incarceration or additional probation.

19. The Superior Court, too, has applied *Bearden* outside of situations where a defendant is incarcerated. In *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988), the Superior Court ruled that *Bearden* and the Fourteenth Amendment are applicable to situations where the defendant is merely seeking admission to Accelerated Rehabilitative Disposition ("ARD"), as the inability for an indigent defendant to access ARD because of a requirement to pay restitution to enter constitutes "a deprivation . . . contrary to the fundamental fairness required by the Fourteenth Amendment." 548 A.2d at 272. Certainly, the defendant in *Melnyk* was not facing the choice between ARD or incarceration,

and the Superior Court did not offer such a myopic interpretation of the Constitution.

IV. <u>Because this Court did not inquire and make factual findings regarding Mr. Marshall's ability to pay, this Court should vacate its order revoking and resentencing Mr. Marshall.</u>

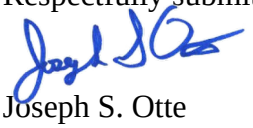
20. At the Gagnon II hearing in this matter, the Court did not hear evidence concerning and did not make factual findings regarding Mr. Marshall's ability to pay the remaining restitution.

21. Mr. Marshall has been compliant with the terms of his probation and the only reason he is being punished with revocation and resentencing his failure to pay the remaining tens of thousands of dollars in restitution, which he cannot afford to do.

22. The order revoking Mr. Marshall's probation is therefore unlawful, and this Court should vacate the sentence pending further proceedings.

WHEREFORE, for the reasons stated herein, Joseph S. Otte requests that this Court grant this motion.

Respectfully submitted,



Joseph S. Otte
PA ID 318862

1002 Law & Finance Building
429 Fourth Ave.
Pittsburgh, PA 15219
(412) 529-0583, ottepgh@gmail.com

THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	CR-3258-2016
vs.	JUDGE THOMAS FLAHERTY
DEREK MARSHALL	

ORDER

AND NOW, this _____ day of _____, 2022, it is hereby ORDERED that the Motion to Vacate Sentence and Schedule Gagnon II Hearing *nunc pro tunc* is GRANTED.

The order revoking and resentencing the Defendant is VACATED and a Gagnon II hearing in this case shall proceed on the _____ day of _____, 2022.

BY THE COURT:

_____, J.